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Before the
Federal Communications Commission
Washington, D.C. 20544

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Implementation of the Cable Television Consumer Protection and Competition Act of 1992 **Review of the Commission's Cable Attribution Rules**	CS Docket No. 98-82
Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 **Horizontal Ownership Limits**	MM Docket No. 92-264

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CONSOLIDATED COMMENTS OF MEDIAONE GROUP, INC.

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MEDIAONE GROUP, INC.

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SUMMARY

MediaOne, the nation's third largest MSO, suffers from one of the most bizarre but unintended consequences of FCC rules. Serving approximately 4.9 million U.S. cable subscribers, MediaOne is approximately half the size of each of the two largest MSOs. Yet the FCC's attribution rules treat it as larger than Time Warner, due to the double counting of customers under the FCC's current attribution rules. Thus, MediaOne currently runs headlong into an artificial 30% limit on cable passings, making it impossible for MediaOne to scale its resources even to reach the actual size which horizontal rules currently allow.

The concerns which give rise to the original rules under the 1992 Cable Act are demonstrably moot. Congress was concerned that the vertical integration of cable operators with cable programmers created market incentives for MSOs to discourage the formation of new cable programming services, which had no other significant avenue to reach customers. Since the ownership limits were first promulgated, the number of unaffiliated programmers has exploded.

MediaOne's experience demonstrates how an MSO's actual programming influence can be limited in fundamental ways by market realities. MediaOne focuses on broadband networks, and has fewer programming interests than any of the top six MSOs, yet is likely to have its growth checked by the current ownership rules. While FCC rules allow up to 40% of the conventional analog channels to be used for affiliated programming, less than 3% of MediaOne's channel capacity carries affiliated channels. While MediaOne obtained a minority interest in a Time Warner affiliate when it was first coventuring on Full Service Networks, it

clearly does not control Time Warner or Warner Bros., or Turner Broadcasting System, Inc. Further, by dramatically expanding its broadband platform, MediaOne has also dramatically expanded the avenues open to unaffiliated programmers through "must carry," commercial leased access, and public, educational, and governmental (PEG) access channels. Moreover, the ubiquitous availability of DBS has created a powerful market force: Given 175 DBS channels and a DBS growth rate in excess of 40%, it would be foolhardy for a cable operator not to make diligent efforts to expand capacity and add channels to meet the competition. In the real world, a reasonable attribution policy would not assume that MediaOne has programming control over twice the subscribers and twice the bandwidth than it actually does. Instead, the rules should be reshaped towards the fundamental "policy of the Congress" to "rely on the marketplace, to the maximum extent feasible."

In 1992, both Congress and the FCC recognized that there were benefits to cable system consolidation, although they were largely seen within the context of the video distribution marketplace. MediaOne has transformed its systems into advanced networks, with upgrade investments far greater than its Social Contract commitments. The company is on a pace to complete 70% of plant to Hybrid-Fiber-Coaxial (HFC) 550 MHz or better (750 MHz) by the end of 1998 – two years before the Social Contract requires. MediaOne's largest region (Northeast) demonstrates the massive improvements in customer service made available with scale, including a Network Operations Center (NOC) for customer service with customer service representatives on duty 24 hours a day, 7 days a week; fiber interconnections of headends to provide redundant routing and minimize outages; and continuous status monitoring, so that the failure or imminent failure of part of the network is immediately known, rather than relying entirely on customers to call to notify us of a service outage. Other MediaOne regions are being similarly advanced, but the horizontal cap arbitrarily prevents growth through significant acquisitions or expansions.

More importantly, scale is essential for MediaOne to offer facilities-based competition in telephony and data. The Commission has recognized the benefits which MSO growth has for competition with ILECs. MediaOne offers residential local telephone service offerings over its HFC network infrastructure in Atlanta and in Southern California, and by the end of 1998, we will offer competitive telephone service to over 1 million ***residences.*** Scale has also allowed MediaOne to aggressively roll out high speed Internet service in Boston, Chicago, Atlanta, Jacksonville, South Florida, Detroit and Los Angeles. By the end of 1998, over 2.4 million homes passed by MediaOne's network will be able to receive high-speed Internet access service. To date, MediaOne has also provided some 300 schools across the country with free high speed connections to the Internet.

But in facilities-based competition, size matters. The largest region (Northeast) is dwarfed by the incumbent LEC's (Bell Atlantic's) customer base. MediaOne's annual cable revenues for the entire country are less than one tenth Bell Atlantic's revenues from the Northeast alone. Yet MediaOne is the party constrained by artificial ownership caps. The distorting effects of the current ownership rules must be contrasted with the rules in place for our competitors. Telephone mergers are subjected to scrutiny under standards which do not find *a priori* concern for concentration below 50%. Even under the heightened scrutiny sometimes applied to the video market, broadcasters are allowed at least a 35% reach, plus more to encourage investment in technology. These more relaxed ownership limits have spurred investment and competitive upgrades. Competition to ILECs for voice and high-speed data rests on an aggressive rollout of wired broadband capacity, along with customer service and telephony capabilities available only with scale.

Unless there are very compelling justifications for prohibiting one form of competitive business growth, FCC attribution policies should not artificially constrain the size of cable companies when size is what will extend consumer benefits.

MediaOne recommends six specific changes to the attribution and ownership rules which reflect the fundamental changes in the communications marketplace since 1992 and promote the goals of the 1992 and 1996 Acts.

1. The Commission's horizontal ownership rule should not attribute customers if an operator certifies that: (1) the interest is a minority interest, and (2) the entity in which the minority interest is held is not included in, and does not come under, the minority owner's carriage negotiations or agreements. As further assurance, the Commission could provide that neither the MSO with a minority interest nor the prime MSO may coerce any video programming vendor to provide, nor retaliate against such vendor for failing to provide, the programming service to the other company.

2. Regardless of the Commission's ultimate decision on how to revise the cable attribution rules, the rules should be revised to scale an entity's attributable portion of cable subscribers to that entity's attributable equity in any business structure. For example, MediaOne's 25.5% interest in Time Warner Entertainment (TWE) would result in attribution of 25.5% of TWE's 9.6 million subscribers.

3. As a corollary to this rule, the Commission should treat partnerships as corporate vehicles for attribution purposes, and allow the holder of the interest to multiply the number of subscribers served by the equity percentage held in limited partnership form. Tax barriers to corporate change, and the corporate efforts to obtain access to capital and other benefits of a venture, should not be allowed to control communications policy, or to dissuade a willing investor from growing its business.

4. The Commission should measure cable penetration as a percentage of all homes served by MVPDs, to recognize that cable in fact competes with all MVPDs for customers.

5. The Commission should allow a single cable operator to serve at least 35% of all MVPD subscribers. In the event the attribution rules are not modified in a manner that eliminates the current double counting, MediaOne proposes that the national limit be the 50% reach allowed in other industries.

6. The Commission should clarify its cable ownership rules to allow a cable operator that is below the cap to internally add customers to existing systems without violating the Commission's rule, even if such internal growth raises the operator's total subscriber base above the cap.

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CONSOLIDATED COMMENTS OF MEDIAONE GROUP, INC.

I. Introduction

When is 4.9 million greater than 9.6 million? When does 4.9 million plus 2.4 million equal 14.5 million? The answers to both these questions lie at the heart of these proceedings. Only when one applies the Commission's attribution rules is a company that serves 4.9 million customers considered larger for horizontal ownership purposes than a company that serves twice as many customers. In these comments, MediaOne Group, Inc. ("MediaOne") explains the anomalous and perverse results erected by a combination of the current attribution and horizontal ownership rules, and proposes specific changes to correct these anomalies.

MediaOne is the parent company of the third largest multiple system operator ("MSO") in the United States, and provides a full range of broadband communications services to approximately 4.9 million U.S. customers. MediaOne submits these Consolidated Comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") *Notice* *of Proposed Rulemaking* in CS Docket No. 98-82 (released June 26, 1998) ("Attribution Proceeding") and the Commission's *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-264 (released June 26, 1998) ("Ownership Limits").

These proceedings are critical to MediaOne's business and to consumers because the rules under review currently hamstring MediaOne's ability to grow and extend the benefits of facilities-based competition to more consumers. By eliminating double counting where one company does not come under another's programming affiliation agreements; by applying more tailored "dilution" standards to both corporate and partnership investments; by measuring concentration as MVPD homes served; and by adjusting the ownership threshold to one more in line with cable's competitors, the Commission can adjust its rules to achieve the goals of improved cable service and increased facilities-based competition to incumbent telephone companies, rather than impede such consumer benefits.

II. The Current Attribution Rules Double Count Subscribers.

A. MediaOne Is Only Half The Size Of TCI And Time Warner, Inc., But It Is Perversely Treated As Larger Than Time Warner Because Of The Commission's Current Attribution Standards.

MediaOne suffers from one of the most bizarre but unintended consequences of FCC rules. Serving approximately 4.9 million cable subscribers, MediaOne is approximately half the size of each of the two largest MSOs. Yet the FCC's attribution rules treat it as larger than Time Warner, a media conglomerate with over 12 million subscribers, and which owns a stable of the most popular basic cable networks, premium services, and movie studios.[1] Thus, MediaOne runs headlong into the current horizontal ownership caps — an artificial 30% limit on cable passings which was adopted as a precaution against vertically integrated MSOs favoring their own programming. The purpose of these comments is to demonstrate that industry history and current market conditions make it unnecessary for the Commission to carry forward such severe prophylactic policies; and to suggest very specific changes which will promote investment in competitive broadband networks and superior customer service facilities.

B. Nearly 10 Million TWE Subscribers Are Double Counted, Treated As Controlled By Time Warner And Also Attributed To MediaOne, Due To A 25.5% Investment Made When US West Was Exploring Full Service Networks With Time Warner.

The fatal flaw of the current attribution and horizontal ownership rules is their routine double counting of customers. When MediaOne (then US West Media Group) first

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[1] Time Warner, Inc. 1997 SEC Form 10-k, filed March 25, 1998.

sought to gain experience with Full Service Networks, it acquired a minority (25.5%) limited partnership interest in an existing subsidiary of Time Warner, into which many of Time Warner's systems were placed. This entity, Time Warner Entertainment Co., L.P. ("TWE") is responsible for managing approximately 9.6 million of Time Warner's subscribers.[2] A key purpose of MediaOne's investment in TWE was to combine the technical expertise of Time Warner and US West in designing and testing Full Service Networks, a purpose which would have been defeated by imposing the conventional insulating barriers — such as total non-participation in the business affairs of the enterprise — under which limited partnership interests are deemed "non-attributable" by the FCC.[3]

As a result, the 9.6 million subscribers served by TWE are counted both against TWE and MediaOne. Time Warner is treated as having full ownership and control of these subscribers and having full ownership and control of the programming decisions of the systems serving them. Likewise, MediaOne is treated as having full ownership and control of these subscribers including full ownership and control of the programming decisions of the systems serving them. Perversely, the attribution rules assign size and influence to two MSOs in a manner that cannot possibly provide a realistic view of the market.[4]

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[2] Proxy Statement for 1998 Annual Meeting of Stockholders of U S West, Inc. Amend. No. 1, SEC Form S-4 at 148 (filed March 18, 1998).

[3] *See* 47 C.F.R. § 76.501 Note 2(g).

[4] This aberrant double counting is endemic in the current attribution rules. For example, MediaOne has a less than 10% equity interest in Primestar, but MediaOne is charged with all 2.5 million Primestar subscribers. The same 2.5 million customers are charged five times over to TCI, Time Warner, Comcast, and Cox. The attribution rules have, through duplicative counting, created 10 million phantom subscribers, essentially creating an MVPD the size

C. Current Attribution Policy Prevents MediaOne From Adding the Number of Customers Now Attributed to the Company.

As a result of these anomalous attribution rules, MediaOne finds itself bumping up against the artificial limit of the 30% horizontal ownership cap. At present, the FCC's attribution policies treat MediaOne as having 9.6 million customers more than the 4.9 million actually served by MediaOne cable systems. This make it impossible for MediaOne to even reach the actual size which is attributed to it. It could not acquire more than another 2.6 million cable subscribers without likely violating the 30% ownership cap.[5] It cannot grow, merge, joint venture, or take any attributable interest in another cable operator which would allow it to scale its resources. **Yet MediaOne directly serves only 8% of the nation's cable customers and does not have any significant programming interests which would warrant such concerns.**

III. Reduced Need for the Attribution Rules/Horizontal Cap

A. Programming Concerns Which Were Central To 1992 Act Have Been Met.

Both Congress and the Commission have made it clear that the horizontal ownership rules (and the attribution rules which serve them) were designed to combat very specific problems forecast in 1992. Congress was concerned that the vertical integration of cable

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of TCI out of thin air.

[5] This number is based on MediaOne's national penetration rate, 58.6% of homes passed. Another 2.6 million customers served would mean MediaOne passes an additional 4.5 million homes, for total homes passed in excess of the current 28.359 million threshold (30% of 94.5 million cable homes passed nationwide = 28.359 million homes passed).

operators with cable programmers created market incentives for MSOs to discourage the formation of new cable programming services and that there was no other significant platform through which independent programmers could reach customers. Congress recognized some off-setting benefits, such as the potential for distributional efficiencies through larger MSOs, but assigned the Commission a balancing role largely focused on the video distribution market, while staying abreast of changes in this "dynamic marketplace."

The dynamics of the market have been transformed. If this ever was a threat, the facts of the video programming market over the past six years demonstrate overwhelmingly that those 1992 concerns have been met, and that a continuation of the current attribution and concentration standards are frustrating Congress' goal of promoting facilities-based competition.

1. History Has Disproved the Premise that MSOs Would Discourage the Formation of Unaffiliated Networks

The present rules are premised on Congress's perceived incentive for MSOs to "discourage the formation of new cable programming services."[6] Although even in 1992, cable television concentration was below the prevailing thresholds for antitrust concern, Congress believed that "concentration of media presents unique problems"[7] by presenting market incentives

[6] CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, H. R. Rep. No.102-628 at 42 (1992)("1992 H.R. Rep."); Second Report in Docket MM 92-264 at ¶ 10.

[7] 1992 H.R. Rep. at 42.

which could impede the "flow of video programming".[8] The Commission has rightly recognized that this concern for video programming is the fundamental animating principal of the rules.[9]

Fortunately, history has shown that the programming market has instead proven uniquely robust. Since the ownership limits were first promulgated in 1992, the number of programmers has exploded. In 1992, there were 67 networks; today there 162, an increase of almost 60%.[10] Of the 88 networks launched since January 1, 1992, over 62% have been *unaffiliated* with any cable MSOs.[11] Despite Congressional concern in enacting this legislation, no monopsony power over programming has materialized.[12]

MediaOne's experience is instructive in demonstrating how an MSO's actual programming influence can be limited in fundamental ways by market realities.

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8 47 U.S.C. § 533(f)(2)(A).

9 Second Report in Docket MM 92-264 at ¶ 10; NPRM at ¶ 10.

10 Statistics computed from the following sources: National Cable Television Ass'n, *Cable Television Developments*, Fall 1997, at 28-97, and *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, 1998 FCC LEXIS 140, Table F-5 (Jan. 13, 1998). This statistic does not take into account networks that have launched and later ceased operations.

11 *Compare Cable Television Developments*, Fall 1997, at 28-97, with *Fourth Annual Report*, 1998 FCC LEXIS at Table F-5. Of the 77 planned national programming services listed in Tables F-3 and F-4 of the Commission's *Fourth Annual Report*, only five (6.5%) of these are affiliated with MSOs. The overwhelming majority — 72 networks, or 93.5% — are unaffiliated with MSOs.

12 *Compare* H.R. Rep. No. 102-628 at 42 (expressing "a concern that MSOs have excess market power, or monopsony power, in the program acquisition market") with *Cable Television Developments*, Fall 1997, at 28-97, and *Fourth Annual Report*, 1998 FCC LEXIS 140, Table F-5.

First, MediaOne made a deliberate corporate decision to focus on broadband networks, rather than assembling stables of in-house programming networks. MediaOne is technically vertically integrated, but it has the least programming interests of any MSO that is likely to have its growth checked by the current ownership rules. MediaOne owns only fractional interests in E!, The Golf Channel, SpeedVision, Outdoor Life, T.V. Food Network, Viewer's Choice, and a 50% interest with Hearst Corp. in New England Cable News ("NECN"), a regional news channel.[13] While FCC rules allow up to 40% of the conventional analog channels to be used for affiliated programming, less than 3% of MediaOne's channel capacity carries affiliated channels. A reasonable attribution policy would be sufficiently refined to not attribute to MediaOne any incentive to discourage the formation of new cable programming services.

Second, MediaOne clearly does not control Time Warner or Warner Bros., or even have an interest in Turner Broadcasting System, Inc.[14] There is no doubt that MediaOne owns a 25% interest in TWE, and that the majority owner of that venture owns popular basic cable

[13] Discussing the increased diversity of programming provided by NECN, the Commission stated: "we agree with NECN that granting its petition [for exclusivity] will have a pro-competitive effect on the New England video marketplace because removal of regulatory barriers to its financial viability will enhance, rather than impair, competition in the market for news, sports, public affairs, information and children's programming." *New England Cable News, Petition for Public Interest Determination Relating to Exclusive Distribution*, 9 FCC Rcd. 3231 at ¶ 32 (1994).

[14] Time Warner, Inc. owns 100% of Turner Broadcasting System, Inc. (which owns 100% of Cable Networks-TBS and Filmed Entertainment-TBS) and 100% of Time Warner Companies, Inc. (which hold Time Warner's publishing interests as well as its partnership in TWE). TWE holds 100% of the Time Warner Cable Networks - HBO and Filmed entertainment, which includes the vast Warner Bros. programming interests HBO, Cinemax, and the WB Network. Time Warner, Inc. 1997 SEC Form 10-k.

networks, premium services, and movie studios. But MediaOne has absolutely no control over Time Warner or Warner Studios, and has no control over the selection of programming on Time Warner cable systems.[15] Indeed, its lack of control over the programming ventures of Time Warner could not have been more strongly expressed than in the 1996 Delaware court decision holding that Time Warner's programming decisions were not controlled by TWE or by US West's preferences.[16] Again, a reasonable attribution policy would not assume that MediaOne has programming control over 9.6 million TWE subscribers when it does not.

Third, by dramatically expanding its broadband platform, MediaOne has also dramatically expanded the avenues open to unaffiliated programmers. Unlike broadcasters, who control all of the programming aired on their analog and digital spectrum, half of MediaOne's channel capacity is earmarked for unaffiliated parties over whom they have no editorial control. Commercial "must carry" and retransmission-consent channels have claim to 33% of capacity, and educational broadcasters have from 1-3 channels.[17] Other programmers have claim to 15% of channel capacity for commercial leased access.[18] Local franchising authorities usually require at least 3 public, educational, and governmental (PEG) access channels, sometimes more. Thus,

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[15] Attachment A, Affidavit of Jedd Palmer, Sr. Vice President of Programming for MediaOne at ¶ 3.

[16] *US West, Inc. v. Time Warner, Inc. and Time Warner Entertainment Co. L.P.,* 1996 De. Ch. LEXIS 55, *21 (Del. Ch. 1996).

[17] *See* 47 C.F.R. § 76.56.

[18] *See* 47 C.F.R. § 76.701.

upgrades from 550 MHz to 750 MHz open up more than 30 analog channels, at least half of which could be used for independent voices. This is one of the central differences between cable and broadcasting which warrant tailored attribution standards for cable.[19] A reasonable attribution policy would account for the market reality that as cable operators expand capacity, diversity of information over their systems is assured.[20]

These structural, regulatory, and business realities place genuine limits on MediaOne's presumed programming power. In view of these realities, it is wholly artificial for the Commission's rules to attribute programming power to Media One which it clearly does not have.

[19] Attribution NPRM ¶13.

[20] In addition, whether digital must carry arises contractually or otherwise, the potential for digital broadcasts to obtain cable carriage without displacing cable services is maximized in a regime which encourages exactly the kind of investment in bandwidth which MediaOne seeks to make. MediaOne will address "digital must-carry" issues in detail in Docket CS No. 98-120.

2. The Pressure of DBS Competition Compels Continued Expansion of Capacity and Addition of Programming.

The present rules are also premised on Congress's perception that there was no viable alternative platform for programmers to reach their audiences. In 1992, few foresaw the explosive growth of DBS. When DirecTV was launched in June 1994, it was accompanied by a major national advertizing blitz. The result: by June 1995, sales of DBS dishes hit one million units, making DBS the most successful first-year rollout of any high-power consumer-electronics product.[21] DirecTV alone has grown 42% in the last 12 months,[22] and high-power DBS service has gone from zero subscribers in 1994 to over 4 million today.[23] Despite its relative size, the ubiquitous availability of DBS has created a powerful market force which negates any concern that MediaOne might "discourage the formation of new cable programming services." DirecTV offers 175 channels of cable programming.[24] The pressure of DBS competition compels MediaOne, and all other cable operators, to continue to expand capacity and add programming. No matter how strong a cable operator's interest in promoting affiliated programming might be, it would still be economically foolhardy for a cable operator not to make diligent efforts to expand capacity and add channels to meet the competition.

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[21] Mark Robichaux, *Dishing It Out: Once a Laughingstock, Direct-Broadcast TV Gives Cable a Scare,* The Wall Street Journal, A1 (Nov. 6, 1996).

[22] Media Business Corp., *SkyReport*, July 1998 at 11.

[23] *Id.* (Total subscribers for DirecTV and Echostar exceed 5 million).

[24] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report*, CS Dkt. 97-141, FCC 97-423 (January 13, 1998) at C-3.

The 1992 Act expresses a fundamental "policy of the Congress" to "rely on the marketplace, to the maximum extent feasible,"[25] and a mandate that ownership rules "reflect the dynamic nature of the communications marketplace."[26] The presence of vigorous competitive pressures on cable operators to expand their programming line up stands in stark contrast to the market as it stood in 1992. This market incentive alone warrants a fresh look at the continued need for artificially aggressive attribution or low horizontal caps.[27]

B. The Expected Benefits of Cable Consolidation Envisioned In 1992 Are Currently Frustrated by Artificial Constraints

In 1992, both Congress and the FCC recognized that there were benefits to cable system consolidation. Congress specifically identified "efficiencies" in "administration, distribution, and procurement of programming" and in risk-taking as counterbalances on an overly stringent limit on the size of MSOs, and left the door open to evaluate other "benefits."[28] In 1992, those benefits were largely seen within the context of the video distribution marketplace.

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[25] CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992, 106 Stat. 1460, 1463, § 2(b)(2).

[26] *Id.* at § 613(f).

[27] Although the Commission has expressed concern over the economic consequences of joint equipment purchases (NPRM ¶ 30), this is not a statutory criteria. Moreover, the industry's Open Cable initiative, in which the Commission has already placed confidence, should eliminate any such concern. The Open Cable initiative is designed to prevent any party--including MSOs--from obtaining a proprietary lock on navigation devices. Instead, the design will permit multiple competing vendors to write to advanced navigation devices, and will promote a single industry standard. This initiative should eliminate any concern that the Commission might otherwise have in equipment purchasing.

[28] 1992 House Report at 43; 47 U.S.C. § 533(f)(2)(D)-(G).

Those benefits have indeed been realized. As US West Media Group, MediaOne first invested in cable television in 1993 with a $2.5 billion co-venture with Time Warner to experiment with Full Service Networks. In 1994, the company purchased a regional cluster in Atlanta from Wometco for $1.2 billion, then made an $11 billion cable investment in late 1996 by acquiring Continental Cablevision, Inc. MediaOne transformed the Atlanta market from a low-capacity, one-way video system to an advanced 750 MHz, two-way active network, at a cost through 1998 of approximately $785 million. MediaOne continued its aggressive technological push with the Continental systems. By the end of 1998, its upgrade investment will exceed $2.5 billion, far greater than the $1.7 billion commitment Continental Cablevision agreed to in the Social Contract with the FCC. Overall, MediaOne is on a pace to complete 51% of plant miles to 750 MHz Hybrid-Fiber-Coaxial (HFC), and another 15% of plant miles to 550 MHz HFC by the end of 1998, two years before the Social Contract requires. Subscribers benefit immediately from more reliable service, improved signal quality, expanded programming choices, and upgraded navigation devices. The addition of standby power and network monitoring further enhance the reliability of the plant.[29]

As a result of investment and scale economies, MediaOne is also an industry leader in customer satisfaction. Consider the largest region, in the Northeast. In 1990, the region employed about 1,500 employees to serve fewer than 700,000 subscribers with 32 headends.

[29] *See*, MediaOne Social Contract, 1997 Progress Report 1997, at 5 - 7.

Through internal growth, system swaps, and technological integration of the region with fiber, the Northeast region now employs about 3,200 employees to serve over 1.2 million subscribers. That consolidation has allowed MediaOne to make massive improvements in customer service, including a Network Operations Center (NOC) for customer service, with customer service representatives on duty 24 hours a day, 7 days a week; fiber interconnections of headends, to provide redundant routing and minimize outages; and network monitoring, so that the failure or imminent failure of part of the system is immediately known, rather than relying entirely on customers to call with a service outage.

Scale also enhances competitive advertising. The Commission has previously recognized the importance of the regional mass-media advertising that clustering allows.[30] We have now entered an intensely competitive era when national branding is crucial to competition, as DirecTV's experience has demonstrated in the video marketplace. MediaOne has pioneered the concept of branding the broadband cable platform itself, rather than merely promoting the

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[30] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Third Order on Recon.*, 9 FCC Rcd. 4316 at ¶¶ 142 - 143 (1995)(allowing advertising of rates "plus franchise fees" to facilitate regional marketing), *further recon denied*, *Thirteenth Order On Recon.*, 11 FCC Rcd. 388, 446 ¶ 146 - 47 (1995)(subsequent history omitted). *See also Uniform Rate-Setting Methodology*, CS Dkt. No. 95-174 (November 29, 1995); *Amended Social Contract of Continental Cablevision, Inc.* 11 FCC Rcd. 11118 ¶¶ 37 - 39 (1996)(FCC has permitted the establishment of statewide or regional rates for equipment and installation, in recognition of market realities); *Social Contract for Time Warner*, 11 FCC Rcd. 2788 (1995).

brands of programmed channels which are being commoditized.[31] National advertising makes sense if we are permitted to expand sufficiently to benefit from national buys.

Growth, however, is an essential element to such improvements. The investments needed to achieve this quality of customer service and network management is affordable only when a region is of a size comparable to MediaOne in the Northeast. Other MediaOne regions are on a similar path. But the horizontal cap arbitrarily prevents growth thorough significant acquisitions or expansions.

C. The Rules Must Accommodate the Benefits of Facilities-Based Competition in Telephony and Data

In 1992, the benefits of MSO growth were largely seen within the context of the video distribution marketplace. But by 1994, the Commission explicitly recognized the benefits which MSO growth would have for competition with ILECs. In a report to Congress, the FCC observed that:

> Clustering . . . may reflect strategic decisions by cable operators to position themselves to compete against LECs that are poised to enter the market for the distribution of multichannel video programming. Creating large geographic regions of contiguous cable markets may allow a single MSO to construct more cheaply the network necessary to provide telephone services on a wide scale. By connecting the contiguous systems with fiber optic links, a large regional cable firm may be able to compete better in both

[31] At first, MediaOne's tagline "This is Broadband, This is the Way" perplexed industry advertising executives. In the two years since, Broadband has gained a multitude of followers.

> voice and video distribution with the RBOCs, which serve large geographic regions. Future cable networks that offer multiple services (voice, video, and data) may require companies to serve larger markets in order to fully take advantage of economies of scale and scope. Therefore, clustering may be viewed as pro-competitive both in terms of cable companies' entry into the market for switched voice and data services, and in terms of positioning themselves for potential competition from LECs in the market for video programming.

In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, 9 FCC Rcd. 7442, 7518-7519 (1994).[32]

By 1996, Congress identified cable television operators as the most likely candidates to provide facilities based competition to ILECs. Indeed, the 1996 Act establishes "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced communications and information technologies and services to all Americans." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996).

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[32] Similarly, in the Fourth Competition Order, the Commission explained that

> regional clustering may also enhance MSOs' ability to compete successfully in the future with LECs and major electric utilities as providers of data transmission and local telephone services. Commenters suggest that clustered systems increase cable operators' ability to be more competitive across a range of markets and technologies (*e.g.*, video programming delivery, telecommunications, Internet access services) as "full service providers" in these markets.

Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 1998 FCC LEXIS 140, ¶ 140 (rel. Jan. 13, 1998) (footnotes omitted).